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No. 92-1489

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT A. MINES, CAROLYN J. HOWARD AND GARY ROBERTS, ETC., PETITIONERS

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Secretary of Health and Human Services has promulgated regulations which authorize the Appeals Council of the Social Security Administration to reopen a case within specified time limits after expiration of the otherwise applicable review period if "[t]he evidence that was considered in making the determination or decision clearly shows on its face that an error was made."

The question in this case is whether the regulations authorize such reopening when it is clear from the face of the evidence that an error of law, rather than of fact, has been made.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 981 F.2d 1068. The order of the district court (Pet. App. 9a-17a) is reported at 715 F. Supp. 293.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1992. The petition for a writ of certiorari was filed on March 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves claims for disability and supplemental security income benefits pursuant to Title II and Title XVI of the Social Security Act, 42 U.S.C. 401 *et seq.*, and 42 U.S.C. 1381 *et seq.* The administrative procedures for such claims begin with an initial determination made upon receipt of an application for benefits and an opportunity for reconsideration of that initial determination. 20 C.F.R. 404.900(a)(1), 404.902; see also 20 C.F.R. 416.1400(a)(1), 416.1402, 404.921, 416.1421.[1] The decision upon reconsideration is binding unless the claimant requests an evidentiary hearing before an Administrative Law Judge (ALJ). See 20 C.F.R. 404.905; 20 C.F.R. 416.1405; see also 20 C.F.R. 404.907, 404.933; 20 C.F.R. 416.1407, 416.1433. A claimant dissatisfied with an ALJ's decision may, within 60 days (subject to extension for good cause), seek review by the Appeals Council of the Social Security Administration. 20 C.F.R. 404.967-404.968; 20 C.F.R. 416.1467-416.1468. Alternatively, the Appeals Council may itself decide, within 60 days, to review the ALJ's decision. 20 C.F.R. 404.969; 20 C.F.R. 416.1469.[2] See generally *Bowen* v. *City of New York*, 476 U.S. 467, 471-472 (1986).

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[1] The administrative procedures for Titles II and XVI are set forth at Subpart J of Part 404, 20 C.F.R. 404.900 *et seq.*, and Subpart N of Part 416, 20 C.F.R. 416.1400 *et seq.*, respectively. To the extent pertinent to this case, the two procedures are virtually identical, except that under Title II a decision can be reopened for "good cause" within four years from the initial determination, see 20 C.F.R. 404.988(b), whereas under Title XVI a decision may be reopened within two years of the initial determination, see 20 C.F.R. 416.1488(b).

[2] The Appeals Council will generally review cases presenting abuse of discretion or error of law; actions, findings, or conclusions not supported by substantial evidence; or broad policy or

While the regulations provide that ALJ decisions not reviewed within 60 days generally become final, certain decisions may be "reopened" after that 60-day period has expired—up to four years after "the initial determination"[3]—upon a finding of "good cause." As pertinent here, "good cause" is defined to include a determination that "evidence that was considered in making the determination or decision clearly shows on its face that an error was made." 20 C.F.R. 404.989(a)(3); 20 C.F.R. 416.1489(a)(3).[4] The Social Security Administration's Program Operations Manual System (POMS) further explains that such an error on the face of the evidence exists when it is "absolutely clear" or "unmistakably certain" that the determination was incorrect, but does not exist when the determination was reasonable when made based on the available evidence and the law as it

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procedural issues which may affect the public interest. 20 C.F.R. 404.970(a)(1)-(4); 20 C.F.R. 416.1470(a)(1)-(4).

[3] Thus, the time limits applicable to reopening begin to run before the time periods applicable to review of ALJ decisions. In many cases, the time consumed by the administrative process after an initial determination (which triggers the deadline for reopening) but before an ALJ renders a decision (which triggers Appeals Council review) can be substantial. We are advised by the Department of Health and Human Services that it is not uncommon for 18 months to elapse between an initial determination and a decision by an ALJ. In view of the different schedules involved, a substantial part of the two-year and four-year periods applicable to reopening may pass before an ALJ renders a decision.

[4] "Good cause" also includes the discovery of "[n]ew and material evidence," 20 C.F.R. 404.989(a)(1); 20 C.F.R. 416.1489 (a)(1), or of a "clerical error," 20 C.F.R. 404.989(a)(2); 20 C.F.R. 416.1489(a)(2). The regulations expressly provide that "good cause" will not be established by "a change of legal interpretation or administrative ruling upon which the determination or decision was made." 20 C.F.R. 404.989(b); 20 C.F.R. 416.1489(b).

then existed; thus, under POMS reopening is not allowed merely to draw different inferences from the evidence or to apply new law to the facts. Pet. App. 6a-7a (emphasis omitted); see also POMS at 04010.020 (1988).

2. Petitioners each received favorable ALJ decisions. Pet. App. 2a. In each instance, the case was reopened by the Appeals Council for "good cause," on the ground that the evidence that was considered clearly showed on its face that an error had been made. In each instance, the ALJ decision finding the claimant disabled was set aside by the Appeals Council. *Id.* at 2a-4a. Petitioners then challenged the Appeals Council's decisions in the United States District Court for the Central District of California, asserting that only a claimant (and not the Secretary) may seek to reopen a decision for "good cause" under the regulations. *Id.* at 13a. The district court rejected that contention and denied petitioners' motions for class certification and for summary judgment. *Id.* at 15a-17a. Deferring to the Secretary's interpretation of the regulations, the court granted summary judgment to the Secretary. *Id.* at 16a-17a.

3. The court of appeals affirmed. Pet. App. 1a-8a. The court first rejected petitioners' contention that the "errors on the face of the evidence" that establish "good cause" to reopen under the regulations are limited to factual, as distinguished from legal, errors. *Id.* at 4a-5a. The court reasoned that the Secretary's interpretation—that clear errors of law may appear on the face of the evidence—was entitled to "great deference," *id.* at 6a, and noted that the Ninth Circuit had previously treated such legal errors as "good cause." *Ibid.* (citing *Overend* v. *Sullivan*, 879 F.2d 673, 676 (9th Cir. 1989)). While apparently reading Second and Seventh Circuit decisions as taking a different view, the court "adopt[ed] the majority view that legal error may constitute good cause for reopening." Pet. App. 4a.

The court of appeals next rejected petitioners' claim that reopening by the Appeals Council after the 60-day review period "would be a violation of due process." Pet. App. 5a n.1. The court explained that its decision in *Overend v. Sullivan*, *supra*, had already "held the Appeals Council practice of reopening a case after 60 days is not a violation of due process." Pet. App. 5a n.1.

ARGUMENT

1. Petitioners contend that the Appeals Council should not be allowed to "reopen a decision favorable to a claimant months or years after the normal 60-day review period is over, and to revise the decision based upon the Council's different view of the law." Pet. 9-10. However, petitioners do not contend, as indeed they cannot, that the text of the regulations precludes the actions taken by the Secretary. Indeed, they do not so much as attempt *any* textual analysis of the regulations. They simply argue, in effect, that any interpretation of the regulations that reduces "finality" in any way is impermissible. Pet. App. 10, 14-15. Petitioners' contentions do not warrant review.

The language of the regulations—requiring that evidence "clearly show[] on its face that an error was made"—plainly encompasses situations when an examination of the evidence considered readily shows that an obvious error of law was committed in reaching the decision in question. Because the plain language of the regulations demonstrates the correctness of the court of appeals' decision, petitioners' argument must fail. In any event, the Secretary's interpretation at the very least represents a reasonable construction of the language of the regulations, and therefore her interpretation is entitled to controlling weight under this Court's cases. See, *e.g.*, *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977).

The question presented by petitioners does not encompass whether the Appeals Council has the authority to reopen at all at the instance of the Secretary, but only whether it may do so "*for an error of law*." See Pet. i (emphasis added). And petitioners do not contend in the body of the petition that, as a matter of law, the Appeals Council may reopen a decision only at the instance of a claimant. However, petitioners note that *McCuin* v. *Secretary of Health & Human Services*, 817 F.2d 161 (1st Cir. 1987), held that "due process guarantees prohibit the Appeals Council from reopening ALJ decisions," Pet. 13, and they cite *McCuin* in support of a broad policy argument to the effect that "finality" is favored by "traditional notions of jurisprudence," Pet. 10, and to illustrate the purported lack of uniformity of the law in this general area. Pet. 13-14. Because petitioners do not as much as endorse (much less attempt to defend) the reasoning or holding of *McCuin*, this case would be a poor candidate to resolve the issue decided by the First Circuit in that case.

In any event, to the extent petitioners' citation to *McCuin* is meant to suggest that due process precludes reopening under *any* circumstances (Pet. 12-13), their argument conflicts with this Court's rejection of the notion that due process has a "fixed content unrelated to time, place and circumstances." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976). As the District of Columbia Circuit has explained:

> [R]eopening by the Appeals Council seems to us properly viewed simply as a late stage in a single proceeding. * * * [T]he problem seems primarily one of timing and degree. It seems doubtful that the First Circuit would have been concerned by a six-month window, and we surely would be troubled by one of 50 years. Although four years is a long time for a claimant to have a benefit payment hang in

> limbo * * * it is not so different from the insecurity faced by the average litigant, even if we confine the comparison to the period between trial court judgment and disposition on appeal.

Sheppard v. *Sullivan*, 906 F.2d 756, 760 (1990). See also *Overend* v. *Sullivan*, 879 F.2d at 675 n.2. Because the First Circuit decision cited by petitioners is aberrational and clearly wrong, and has been disavowed by other circuits, the First Circuit can be expected to reconsider it in due course without this Court's intervention.

There is no greater merit to petitioners' contention that review is warranted because the Second and Seventh Circuits "have found, in direct opposition to the court below, that only factual, and not legal, error may form the basis for a good cause reopening." Pet. 11. Although the court of appeals intimated—without explanation—that there was some tension between its conclusion and the two cases cited by petitioners (Pet. App. 4a), those cases do not conflict with the decision below. Indeed, neither case supports the broad proposition advanced by petitioners.

In the first case, *Gutierrez* v. *Bowen*, 898 F.2d 307 (1990), the Second Circuit held that the claimant's case could not be reopened to reassess the credibility of a witness, *id.* at 311-312, or to apply to the claimant a "new legal interpretation" of a regulation that specified when money in a bank account may be deemed the property of the account holder. *Id.* at 310-311 & n.4. Thus, in the Second Circuit's view, the grounds cited for reopening simply did not show a "clear" error, factual *or* legal. Similarly, in *Hale* v. *Sullivan*, 934 F.2d 895 (1991), the Seventh Circuit concluded that the Appeals Council may not merely "reassess[] the ALJ's findings" to conclude that a claimant is "not disabled." *Id.* at 897. Like *Gutierrez*, *Hale* stands for the unremarkable proposition

that no "clear" error of any type is shown when the Appeals Council simply disagrees with the weight assigned to the evidence by the ALJ.[5]

In sum, petitioners have cited no court of appeals decision which actually holds that the Appeals Council may not reopen for "good cause" when the evidence clearly shows on its face that a legal error has been made. On the other hand, as the court of appeals noted, four circuits have expressly held that the Appeals Council may reopen on such a basis. See *Sheppard* v. *Sullivan*, 906 F.2d at 758-759; *Overend* v. *Sullivan*, 879 F.2d at 675-676; *Fox* v. *Bowen*, 835 F.2d 1159, 1163-1164 (6th Cir. 1987); *Munsinger* v. *Schweiker*, 709 F.2d 1212, 1214-1216 (8th Cir. 1983). Because the court of appeals' decision on this point is consistent with every case that has considered the question, review is not warranted.

2. Petitioners also contend that review is warranted because "[i]f reopening is allowed for both factual and legal error, there is no case for which reopening could not occur," a result that in petitioners' view "renders meaningless the [60-day] review procedure." Pet. 15. That argument, however, mischaracterizes the standards governing reopening under the Secretary's regulations. Those regulations do not provide that "any" error (Pet. 15) constitutes "good cause," but only that "absolutely clear" or "unmistakably certain" (Pet. App.

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[5] The last case cited by petitioners as "conflicting" with the decision below, *Butterworth* v. *Bowen*, 796 F.2d 1379, 1386 (11th Cir. 1986), is inapposite. The reopening challenged in *Butterworth* was under 20 C.F.R. 404.988(a), see 796 F.2d at 1382 n.3, which provides for reopening within 12 months "for any reason." Accordingly, the court of appeals had no occasion to consider the issue presented in this case—whether the Secretary can reopen within four years for "good cause" under 20 C.F.R. 404.988(*b*)—where the evidence clearly shows on its face that a legal error had been made.

6a-7a (emphasis omitted)) factual or legal errors do. The focus of the "good cause" exception (as applied by the Secretary here) therefore is not on the factual or legal character of the asserted error, but on its obviousness. Thus, contrary to petitioners' intimation, the "good cause" exception applies to a relatively small class of cases in which glaring errors have been committed—an escape valve that hardly renders the ordinary review procedure that applies to the more usual cases "meaningless."

Furthermore, although in this case the regulations were invoked to reopen decisions finding the three petitioners disabled, the regulations also permit reopening of decisions finding the claimant not disabled. Contrary to petitioners' contention, then, the regulations protect the interests of claimants, as well as the public interest in preventing payment of benefits to individuals who are clearly ineligible.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Moreover, if a claimant has already begun to receive benefits under a decision that is subsequently set aside upon reopening, recoupment of the overpayments may be waived on equitable grounds. See *Sullivan* v. *Everhart*, 494 U.S. 83 (1990).